Supreme Court, U.S.
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No. 06-

In the Supreme Court of the United States

In re M2 SOFTWARE, INC.

M2 SOFTWARE, INC.,
Petitioner,

v.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (Real Parties In Interest: Madacy Entertainment, Handleman Company, SFX Entertainment, M2 Communications, L.L.C., Gaylord Entertainment, Jeffory Moseley)
Respondents

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF MANDAMUS

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QUESTION PRESENTED

1. Whether this Court should grant mandamus to direct the United States Court of Appeals for the Ninth Circuit to enforce the nondiscretionary, automatic and mandatory recusal statute of 28 U.S.C. § 455 to recall the mandates, vacate the opinions, and reassign the underlying appeals where the authoring Judge held a direct financial interest in the subject matter in controversy and in a real party in interest to the proceedings.

RULE 29.6 STATEMENT

Petitioner is M2 Software, Inc. (hereinafter "M2"). Petitioner has no parent corporation and there is no publicly held company owning 10% or more of Petitioner's stock.

Respondent is the United States Court of Appeals for the Ninth Circuit. This matter concerns the failure of The Hon. Harry Pregerson to recuse himself from participating in two appeals in which he held a financial interest and the failure of the Court of Appeals to recall the mandates, vacate the judgments, and reassign the appeals when the structural due process violation was discovered after the judgments had been entered.

Defendant-Respondents:

In *M2 Software, Inc. v. M2 Communications, et al* (U.S.C.A. 03-56602) ((hereinafter "*M2 Communications*" or "*M2Comm*"): M2 Communications, LLC; Gaylord Entertainment; Jeffory Moseley.

In *M2 Software, Inc. v. Madacy Entertainment, et al* (U.S.C.A. 03-55957) (hereinafter "*Madacy*"): Madacy Entertainment; Handleman Company; SFX Entertainment.

Other Parties with a Financial Interest in the Outcome of this Proceeding:

Time Warner, Inc.
Warner Music Group
Clear Channel Entertainment
Viacom, Inc.
Viacom International, Inc.
MTV Networks Company

A Petition for a Writ of Certiorari to address a narrow, but recurring, federal question in the present cases has been concurrently filed. A different Petition in a related case may be affected by the outcome of the present Petition. *M2 Software, Inc. v. M2 Communications, Inc.* (U.S.S.C. 06-515).

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Petitioner M2 Software, Inc. (hereinafter "M2"), requests that this Court issue a Writ of Mandamus directing the United States Court of Appeals for the Ninth Circuit to recall the mandates, vacate the judgments, and reassign the appeals in the *M2 Communications* and *Madacy* cases to a new and different panel of judges.

OPINIONS BELOW

The published Order of the Ninth Circuit in *M2 Software, Inc. v. M2 Communications, et al* (U.S.C.A. 03-56602) is reported at 463 F.3d 868) and reproduced in the Appendix hereto ("App.") at 1a. The published Order of the Ninth Circuit in *M2 Software, Inc. v. Madacy Entertainment, et al* (U.S.C.A. 03-55957) is reported at 463 F.3d 870 and reproduced in the Appendix at 4a. A single Petition is submitted for a Writ of Mandamus in the two related cases as they concern substantially identical Orders decided by the same panel of judges and concerning the same question, with mandamus required to direct the same court to fulfill the same nondiscretionary duty. *See* Sup. Ct. Rule 12.4 (instructing single petition for analogous situation in certiorari context).

JURISDICTION

The court of appeals entered its published Orders on August 21, 2006. The court of appeals denied M2 Software's petitions for rehearing *en banc* on October 26, 2006. App. 7a-8a. This Court's jurisdiction is based on 28 U.S.C. § 1651 . Sup. Ct. Rule 20.3.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V, United States Constitution [App. 9a] provides, in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

See Tumey v. Ohio, 273 U.S. 510, 523, 534 (1927); *Republican Party of Minn. v. White*, 536 U.S. 765, 776 (2002) ("an impartial judge is essential to due process").

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 455 [App. 10a] provides, in pertinent part, that a United States judge:

(a) * * * shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) * * * shall also disqualify himself in the following circumstances: * * * *

> 4) he knows that he * * * has a financial interest in the subject matter in controversy or in a party to the proceeding.
>
> 5) He * * *
>
> (i) Is a party to the proceeding * * * *
>
> (iii) Is known * * * to have an interest that could be substantially affected by the outcome of the proceeding.

(c) * * * shall inform himself about his personal * * * financial interests * * *

(d) * * * (4) "financial interest" means ownership of a legal or equitable interest, however small * * *

(e) No * * * judge * * * shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b) * * *.

28 U.S.C. § 46(b) [App. 13a] requires an appellate panel of a minimum of three judges:

> In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges * * *. The United States Courts of Appeals * * * may determine by rule the number of judges, not less than three, who constitute a panel * * *.

28 U.S.C. §144 [App. 15a] provides, in pertinent part:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

STATEMENT OF THE CASE

I. Introduction and Summary

Petitioner seeks a Writ of Mandamus directing the United States Court of Appeals for the Ninth Circuit to recall the mandates, vacate the judgments, and reassign the *M2 Communications* and *Madacy* appeals to a new and different panel of judges. The Ninth Circuit had a nondiscretionary duty to grant Petitioner's motion to enforce the mandatory, nonwaivable, and automatic recusal statute of 28 U.S.C. § 455. The Honorable Harry Pregerson, Judge in the Court of Appeals for the Ninth Circuit, should have been disqualified because he was an owner of equity in a real party in interest and in the subject matter in controversy in the two related cases on which he ruled. The cases involved claims of trademark infringement, trade name infringement, unfair competition, and (in *M2 Communications*) a claim of fraudulent transfer of an infringing division to Time Warner, Inc.

A Judge's knowledge that he has any "financial interest in the subject matter in controversy or in a party to the proceeding" – even a single share of stock – triggers the nondiscretionary and automatic recusal requirement of 28 U.S.C. § 455(b). In April 2006, the *Washington Post* published an investigative report on judicial ethics revealing that Judge Pregerson owned an equity stake in Time Warner, Inc. At that time, at the very latest, Judge Pregerson knew that he held a conflicting financial interest on the decisions that he authored. Time Warner, Inc. not only owned the subject matter in controversy, it was also a real party in interest to the litigation. It was identified in the complaint as the receiving entity of an alleged fraudulent transfer that the lawsuit sought to void. Upon learning of Judge Pregerson's financial interest, Petitioner promptly filed its motion to recall the mandates, vacate the judgments, and assign the appeals to a new panel of judges.

The United States Court of Appeals for the Ninth Circuit had a non-discretionary duty to enforce the man-

datory recusal provisions of 28 U.S.C. § 455 and grant Petitioner's motion. The Ninth Circuit failed to do so, allowing the panel to *self-determine* and deny a motion that would have required Judge Pregerson, author of the lead decision of the related cases, to find himself in violation of the mandatory federal statut .

While the appeals were ongoing, Time Warner, Inc. executed the sale and option repurchase of the primary division involved in both cases, Warner Music Group. Pursuant to S.E.C. filings, Warner Music Group was "Time Warner Inc.'s music division" until "substantially all" of the division was subject to the sale and option-buyback of March 1, 2004 (the "**WMG Transaction**").[1] Judge Pregerson relied upon this sale – entirely disregarding the earlier time period of infringement – to deny the Petitioner's motion to recall the mandates, vacate the opinions, and reassign the appeals. Only by overlooking this pre-2004 period of Time Warner, Inc.'s full 100% ownership of the music division could Judge Pregerson conclude that "Time Warner was not a party to the suit" and that Time Warner only "had an *option* to purchase 19.9% of a company [Warner Music Group]." App. 1a-2a, 4a-5a (emphasis in original).

In deciding the Orders below, Judge Pregerson and the underlying panel rejected the request of the Petitioner that a new Judge or panel hear the motion. In addition to the mandamus question raised herein, a narrow issue is raised for certiorari (separate Petition for Writ of Certiorari filed concurrently herewith) as to whether a Judge at the Court of Appeals level may self-determine a motion for his own recusal under 28 U.S.C. § 455.

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[1] Supp. Decl. of Mark L. Pettinari in Supp. of MTR ("*MLPSupp.*") ¶2, Ex. 1 at 3. In the WMG Transaction, Time Warner, Inc. sold shares in its formerly 100% owned music division via a $2.6 billion sale in which it repurchased convertible securities for a 19.9% equity interest (a half-billion dollar stake) in the former division – now known as "Warner Music Group" – through stock options that were not due to expire until 2007, long after the conclusion of the appeal. *MLPDecl.* ¶4, Ex.3 at 15.

II. Background of the Case

Petitioner is a Delaware corporation that started its life as a record label in 1991. Petitioner expanded into an interactive music content market segment and a "music industry infrastructure" market segment in which it provides record label databases and record label administration services to major record labels. Petitioner has provided its products and services under its **M2** trademark and trade name for over fifteen years and owns an incontestable federal registration for the trademark. U.S. TM Reg. No. 1,931,182. Petitioner is the senior owner of the **M2** mark in the music industry. *M2 Software, Inc. v. Viacom, Inc.*, 30 Fed.Appx. 710, 711 (9th Cir. 2002) ("*Viacom*") (Petitioner "indisputable senior user of the M2 mark").

The uses of an identical trademark in both of the present cases arose during the discovery phase in *Viacom*. Out of a universe of marks, two record label affiliates of Time Warner, Inc. (*Madacy* and *M2 Communications*) launched separate music industry ventures under the **M2** trademark and trade name. Both produced some of the same classes of products as Petitioner as identified in Petitioner's registration. U.S. TM Reg. No. 1,931,182. Both ventures appeared just weeks after a District Court in *Viacom* had rejected Viacom's defense that there was a "crowded field" of **M2** trademarks because Viacom had been unable to identify a single use of the **M2** trademark in the music industry other than that of Petitioner.[2]

The defendants in both new cases were related to Viacom, Inc. One named Defendant, Gaylord Entertainment, owned $613 million of Viacom, Inc. equity out

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[2] *M2 Software, Inc. v. Viacom, Inc.* (C.D. Cal. 98-CV-8734, Docket No. 61, Jan. 27, 1999), *Order Denying Prelim. Injunction*, at 8, 18 (finding Petitioner "likely to prevail" on its claims). Petitioner eventually received a permanent injunction on September 7, 2004 against Viacom's use of the marks "M2" or "M2: Music Television" in a case that is on appeal on related issues. (*Id.*, Docket No. 344, Sep. 7, 2004)

of total stockholder equity of $727 (a full 84% of the company) at the time of launch, and shared substantial production facilities, various employees, a common corporate director, and the same trademark attorneys with Viacom, Inc.[3] Another named Defendant, SFX Entertainment, was reported to be in merger negotiations with Viacom at the time of the **M2** launch.[4] Judge Pregerson, equity owner of Time Warner (Viacom's music partner),[5] entered rulings that prevented the bad faith conduct alleged under these circumstances from ever being tried.

The *M2 Communications* infringement was operationally launched by transferring an established musical group from Time Warner, Inc.'s Warner Alliance label to a newly-formed limited liability company branded with the **M2** trademark. *M2Comm* ER25-12/14; ER65-3. The company was formed on April 23, 1999, with an application filed at the Patent and Trademark Office ("PTO") on September 7, 1999. *M2Comm* ER50-12/13, ER69-6. The *Madacy* infringement was operationally launched by rebranding an existing product line manufactured by Time Warner, Inc.'s Warner Special Products with the **M2** trademark and division name. *Madacy* ER49-62/64; ER49-37; ER61-31. The *Madacy* venture adopted the **M2** trademark in "March or April" of 1999 with an application filed in the PTO on August 3, 1999. *Madacy* ER61-17; ER49-27/28.

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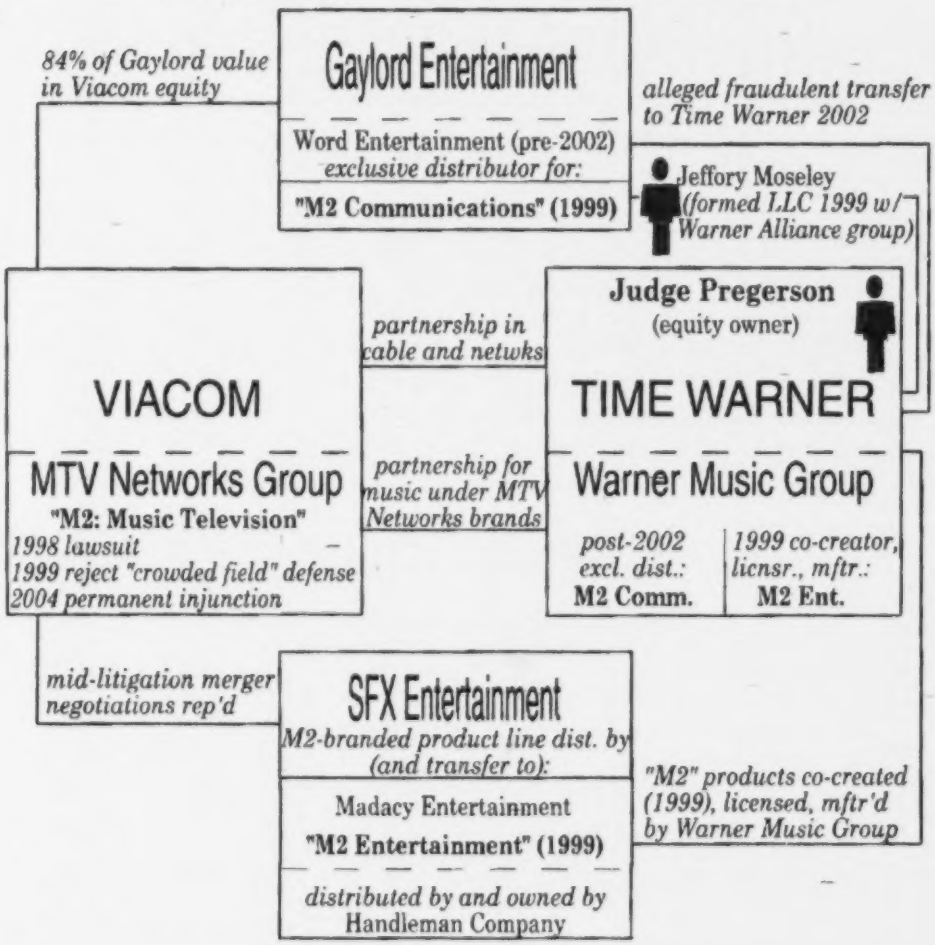
[3] *See M2Comm* ER25-28/30 (Securities and Exchange Commission records); ER04-08; ER50-14/15; ER67-6/7.

[4] *See* http://www.businessweek.com/2000 /0_10/b3671180.htm. *MLP Decl.* at 5, Ex. 4.

[5] Time Warner, Inc. operated several 50/50 joint venture partnerships in cable and networks with Viacom, and manufactured musical CD's and other record music products under Viacom's MTV Networks brands. http://www.pbs.org/wgbh/pages/frontline/shows/cool/giants/aoltimewarner.html; http://www.amazon.com/gp/search/?url=index%3Dblended&field-keywords=MTV.

Petitioner timely pursued the two new infringements in federal court and in Opposition proceedings before the PTO. On October 3, 2001, Petitioner commenced a trademark Opposition proceeding against the *M2 Communications* application. (T.T.A.B. Opp. No. 91/124,775). *M2Comm* ER04-8/9, 17/20. On January 4, 2002 Defendant Gaylord transferred Word Entertainment – the exclusive distributor of the *M2 Communications* infringement – to Time Warner, Inc. *M2Comm* ER39-4 (the "**TW-Word Acquisition**"). A summary diagram of the defendants and the above-described corporate relationships is set forth below:

TABLE I: Corporate Relationship of Defendants


Gaylord Entertainment
Word Entertainment (pre-2002)
exclusive distributor for:
"M2 Communications" (1999)
84% of Gaylord value in Viacom equity
alleged fraudulent transfer to Time Warner 2002
Jeffory Moseley
(formed LLC 1999 w/ Warner Alliance group)
Judge Pregerson
(equity owner)
VIACOM
TIME WARNER
partnership in cable and netwks
MTV Networks Group
"M2: Music Television"
1998 lawsuit
1999 reject "crowded field" defense
2004 permanent injunction
partnership for music under MTV Networks brands
Warner Music Group
post-2002 excl. dist.: M2 Comm.
1999 co-creator, licnsr., mftr.: M2 Ent.
mid-litigation merger negotiations rep'd
SFX Entertainment
M2-branded product line dist. by (and transfer to):
Madacy Entertainment
"M2 Entertainment" (1999)
distributed by and owned by Handleman Company
"M2" products co-created (1999), licensed, mftr'd by Warner Music Group

A. Time Warner, Inc. Was a Defendant in Interest to the Litigation

1. The Litigation Sought to Void a 2002 Acquisition by Time Warner, Inc.

In *M2 Communications*, Petitioner sought to void the TW-Word Acquisition as a fraudulent transfer in violation of Cal. Civ. Code § 3439.01 *et seq.*, alleging:

1.) "Gaylord's transfer of the Word Entertainment division to AOL Time Warner is a 'transfer' as that term is defined by Cal. Civ. Code § 3439.01(i) * * *." [*M2Comm* ER04-17/20].

2.) "Plaintiff's damages are a 'claim' as that term is defined by Cal. Civ. Code § 3439.01(b) * * * accrued before Defendant Gaylord's transfer of Word Entertainment to AOL Time Warner was made. * * * [Such transfer was made] with actual intent to hinder, delay or defraud Plaintiff." *Id.*

3.) "[Plaintiff prays] * * * That the Court void as fraudulent the transfer of the Word Entertainment division from Defendant Gaylord to AOL Time Warner, pursuant to Cal. Civ. Code § 3439.07." *Id.*

2. During an Infringement Period, Time Warner, Inc. Was 100% Owner of an Infringing Division as Successor to a Named Party

The *M2 Communications* complaint sought to void the TW-Word Acquisition as a fraudulent transfer. ER04-17/20. Word's former parent Gaylord Entertainment was named as a defendant, eliminating the need to name real party in interest Time Warner, Inc. as a separate party in the "shell game" of ownership that was alleged. The formalities of named parties are not relevant to recusal because, as set forth below, the mandatory recusal requirement is not limited to named parties. 28 U.S.C. § 455(b)(4). After the TW-Word Acquisition, Time

Warner, Inc. – and thus Judge Pregerson – became full owner of the division accused in the lawsuit.

Judge Pregerson's concurring opinions in the Ninth Circuit Orders refusing to recall the mandates, vacate the opinions, and reassign the appeals rely upon a miscasting of Warner Music Group, the music division into which the TW-Word Acquisition was received, as a completely separate entity from Time Warner, Inc. App. 2a, 5a. The Ninth Circuit Orders disregarded that the TW-Word Acquisition occurred in 2002, prior to the 2004 WMG Transaction. In fact, the Word division was a principal part of Time Warner, Inc.'s $2.6 billion dollar sale of Warner Music Group when the 2004 WMG Transaction occurred.[6] Time Warner, Inc.'s direct financial interests were at issue (including Time Warner, Inc.'s proceeds from its 2004 resale of the allegedly void prior acquisition that was the subject of this lawsuit).

3. Time Warner, Inc., and Therefore Judge Pregerson, Held a Direct Financial Interest in Avoiding Infringement Findings

In addition to seeking to void the TW-Word Acquisition, Petitioner sought a permanent injunction in both *Madacy* and *M2 Communications* that would have extended to Time Warner, Inc. Petitioner sought a permanent injunction against defendants "and each of their agents, * * * successors, and assigns" against use of Petitioner's federally-registered **M2** trademark in the manufacturer or distribution of the infringing products. *M2Comm* ER04-19; *Madacy* ER22-17. While Time Warner, Inc. was not formally named as a party, the pleadings identified Time Warner, Inc. as a central defendant in interest – the active, moving participant who had pro-

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[6] *See Supra,* n. 1; *MLPSupp.* ¶2, Ex. 1 at 6 (Word identified to S.E.C. as part of the "principal Recorded Music distribution operations" of Warner Music Group). An album from the **M2**-branded label facing infringement charges was a "top" album for Warner Music Group. *Id.*, at 11 ("Mercy Me" [ER151-72]).

vided the means for the most capital-intensive aspects of the infringement and who recognized significant financial gains from the infringement. *Supra*, n.6. In *Madacy*, Time Warner, Inc. was co-creator, producer, licensor and exclusive manufacturer of the infringing product line rebranded with the **M2** mark.[7] In *M2 Communications*, the new brand was launched by transferring an established group from Time Warner's Warner Alliance label in 1999. Time Warner, Inc. became the direct owner of the exclusive distributor of the **M2** products after 2002.[8]

B. Judge Pregerson Knew of His Financial Interest in a Real Party in Interest and the Subject Matter in Controversy, but Failed to Disclose His Equity Stake to the Parties

The Complaint and the pleadings clearly identified Time Warner, Inc. as a real party in interest to the proceedings with a stake in the subject matter of both litigations. *Supra*, n.7, n.8. Judge Pregerson knew that he owned equity in Time Warner, Inc., but did not disclose this interest to the parties during the proceeding.

On April 18, 2006, the *Washington Post* published a report on violations by certain federal judges of the mandatory recusal statute. *See Washington Post*, April 18, 2006 (A17), "Ethics Lapses by Federal Judges Persist, Review Finds: Violations Involve Stock Holdings

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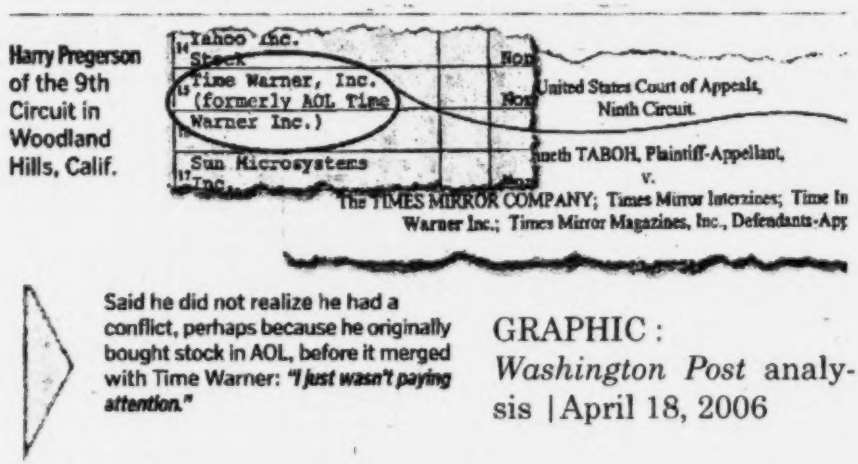
[7] *See* App. 5a; *Madacy* ER-49-64/69 (**M2** co-brand under Warner Special Products); ER292-43 ("Warner Special Products, which is the division of Warner Music Group that helped us create this [**M2**-branded] CD...[and executed] licensing of the music and the manufacturing of the discs.").

[8] *See* App. 2a; *Brief of Appellee Gaylord Entertainment* (filed March 1, 2004) at 2 (claims arise from distribution of the **M2**-branded products, distributed after January 1, 2002 by Warner Music Group); *M2Comm* ER25-12/14; ER65-3; ER151-54 (10-K 2002); ER92-35/37; ER39-4; ER25-44; ER69-10.

and Free Trips").[2] The *Post* article identified Judge Pregerson's equity interest in Time Warner, Inc., criticizing the Judge's failure to recuse himself in an earlier case that had also involved Time Warner, Inc. An accompanying graphic of the disclosure form submitted by Judge Pregerson revealed that Judge Pregerson had knowledge of his financial interest in Time Warner, Inc., as well as knowledge that this company was "formerly AOL Time Warner Inc.":

TABLE II: Washington Post, April 18, 2006


Harry Pregerson of the 9th Circuit in Woodland Hills, Calif.
Yahoo Inc. Stock
Time Warner, Inc. (formerly AOL Time Warner Inc.)
Sun Microsystems Inc.
United States Court of Appeals, Ninth Circuit
TABOH, Plaintiff-Appellant,
v.
The TIMES MIRROR COMPANY; Times Mirror Interzines; Time In
Warner Inc.; Times Mirror Magazines, Inc., Defendants-App
Said he did not realize he had a conflict, perhaps because he originally bought stock in AOL, before it merged with Time Warner: "I just wasn't paying attention."

GRAPHIC : *Washington Post* analysis | April 18, 2006

Thus, Judge Pregerson knew that he owned Time Warner, Inc., knew that the company was "formerly AOL Time Warner, Inc.," and knew that the company was specifically identified in the Complaint as "AOL Time Warner." ER04-17/20. Recusal was automatic, mandatory, and nonwaivable under 28 U.S.C. § 455(b)(4). Mandamus is required to direct the Ninth Circuit to enforce the nondiscretionary statute.

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[2] Declaration of Mark L. Pettinari in Support of Motion to Recall the Mandates and Vacate the Opinions Dated August 31, 2005 and September 12, 2005 and Subsequent Judgments Herein and to Reassign the Appeals to a New Panel ("*MLP Decl.*") at ¶2, Ex. 1 (chart displayed at Ex. 1, page 3).

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III. Proceedings Below

The merits of the underlying decisions go to the risk of injustice, a factor relevant to the analysis of whether allowing a new and impartial panel to take a fresh look at the case would be fairer to the parties than to allow the decisions to stand. *See Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 868 (1988). The underlying appeals were taken in 2003, after a district court entered full or partial summary judgment in *M2Comm* and *Madacy* (with a limited partial trial in *Madacy*). In both appeals, orders were entered in 2003 and 2004 that pre-dated the WMG Transaction.[10] On August 31, 2005, Judge Pregerson authored a decision in which he affirmed summary judgment against Petitioner and in the favor of Time Warner, Inc.'s interests in *Madacy*. *M2 Software, Inc. v. Madacy Entertainment*, 421 F.3d 1073 (9th Cir. 2005), *cert. denied*, ---U.S.---, 126 S.Ct. 1772 (2006) ("*Madacy 2005*"). This was followed on September 12, 2005 by a similar decision that cited *Madacy 2005* in the favor of Time Warner, Inc.'s interests in *M2Comm*. *M2 Software, Inc. v. M2 Communications, LLC*, 149 Fed.Appx. 612 (9th Cir. 2005), *cert. denied*, ---U.S.---, 126 S.Ct. 1772 (2006) ("*M2Comm 2005*").

A. The Underlying Appeals

1. Judge Pregerson Improperly Weighed Facts in the Trademark Infringement Claims

To avoid summary judgment, Petitioner was required only to establish that there existed a genuine issue of material fact. Fed. R. Civ. P. 56(c). The multi-factored

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[10] An Order dated January 30, 2004 granted the defendants a cumulative 73 day extension, allowing the *M2Comm* defendants to defer their opposition brief until after Petitioner had filed its reply brief in the related case. See *Pl.'s Motion to Amend Briefing Schedule* (*M2Comm*, filed 2/3/2004, denied 3/1/2004) and *Pl.'s Motion For Extension to Preserve Briefing Order* (*Madacy*, filed 2/19/2004, denied 2/20/2004).

test of *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348 (9th Cir. 1979), favored Petitioner:

TABLE III: Judge Pregerson's Weighing of Factors
H=heavy weighting, U=unspecified, S=slight weighting

	Petitioner	Defs.
1) Strength of the mark (**pivotal**);	U	
2) Proximity of the goods (**pivotal**);	S	
3) Similarity of the marks (**pivotal**);	S	
4) Evidence of actual confusion;	[U] [11]	U
5) Marketing channels used;	[U] [12]	H
6) Sophistication of purchasers;		U
7) Defendant's intent;	[*see Supra* n.2-5]	S
8) Likelihood of expansion.		U

The three factors deemed "pivotal" in this type of trademark case indisputably weighed in Petitioner's favor.[13] An appearance of bias stemming from the Judge's ownership of Time Warner, Inc. equity was exacerbated because Judge Pregerson weighed the remaining secondary factors (most susceptible to jury interpretation) for the defendants, and surprisingly affirmed a *summary*

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[11] Where an infringer quickly folds [*Madacy 2005*, 421 F.3d at 1078], actual confusion is not considered. *Gillette Canada, Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). That it nonetheless occurred here immediately is highly probative. *Madacy 2005*, 421 F.3d at 1083.

[12] The District Court weighed "marketing channels" in favor of Petitioner. *Madacy 2005* at 1084. On appeal, the Judge instead rejected evidence that the parties shared exactly the same trade shows because they did not attend in the same year. *Id.* Yet timing goes to actual confusion and damages, not to whether the channels were the same.

[13] *See Dreamwerks Prod. Group Inc. v. SKG Studio*, 142 F.3d 1127, 1130 (9th Cir.1998). The "pivotal" factors: i) the trademark was strong and fanciful, ii) junior users had adopted a substantially identical trademark, and iii) the parties' goods and services were related. *Madacy 2005*, 421 F. 3d at 1080-82. The trademarks collided in the music industry, with promotion at the same music industry trade shows, in the same music industry guides, and to the same labels. *M2Comm* ER78-29/31; ER151-25/28; *Madacy* ER60-21/24; ER49-23.

judgment in favor of the Time Warner, Inc. interests. In so doing, Judge Pregerson was forced to violate *stare decisis*[14] by contradicting an earlier Ninth Circuit decision concerning the same trademark and related corporate defendants – a decision on which Judge Pregerson had been the sole dissenter. *Cf. Viacom,* 30 Fed. Appx. 710.

2.Judge Pregerson's Decision Ignored "Express Aiming" Allegations and Prevented the Time Warner, Inc. Fraudulent Transfer Claim from Being Tried

The appearance of bias is extended because the panel on which Judge Pregerson sat affirmed the personal jurisdiction dismissal of two Time Warner-affiliated defendants in *M2 Communications* by miscasting allegations. The Complaint alleged that the defendants expressly aimed a bad faith trademark infringement intended to damage the federal trademark of a California resident corporation and its position in a pending California-based trademark case. ER04-08. At the pre-discovery stage, the allegations in a Complaint should have been "taken as true" to establish *prima facie* personal jurisdiction. *Calder v. Jones*, 465 U.S. 783, 790 (1984); *Harris Rutsky & Co. Ins. Services, Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1128 (9th Cir. 2003).

Even prior to discovery, Petitioner provided evidence of express aiming. *See Supra* n. 2-5. Judge Pregerson ignored this evidence and mischaracterized the plain allegations as "[t]he mere fact that M2 Communications owns Viacom stock." *M2Comm 2005*, 149 Fed.Appx. at 615 (emphasis added). Astonishingly, this "mere fact" was *never* alleged. Instead, the allegations were that Defendant Gaylord owned 84% of its value in Viacom equity [*Supra* n. 2-5] and that the defendants

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[14] *See Vasquez v. Hillery*, 474 U.S. 254, 265 (1986); *Spangler v. Abercrombie & Fitch*, 79 Fed.Appx. 325, 326 (9th Cir. 2003); *United States v. Hogan*, 986 F.2d 1364, 1369 (11th Cir.1993).

"conspired to, and did, launch the present 'M2' venture in an attempt to bolster Viacom's primary defense argument * * * under the doctrine of the crowded field" in a California court. ER-04-08 (emphasis added); ER92-3; ER151-34. By ignoring express aiming, Judge Pregerson affirmed jurisdiction dismissal that had been granted before either defendant had submitted a *single* response to even rudimentary jurisdictional discovery. *M2Comm* ER200-3(#11), 200-13(#98); ER92-4/33. In so doing, Judge Pregerson disposed of the claim of fraudulent transfer, avoiding the financial detriment to his owned company, Time Warner, Inc., that would have resulted had the TW-Word Acquisition been voided.

B. Judge Pregerson's Self-Determination and Denial of the Recusal Motions

The Judge's errors and crucial oversights in the underlying decisions favoring Time Warner, Inc. demonstrates that "there is a greater risk of unfairness in upholding the judgment * * * than there is in allowing a new judge to take a fresh look at the issues." *See Liljeberg*, 486 U.S. at 868. On July 7, 2006, just 15 days after discovering Judge Pregerson's equity stake in Time Warner, Inc., Petitioner filed a motion to recall the mandates, vacate the judgments, and reassign the appeals to a properly constituted panel.

On August 21, 2006, in a decision noted in front-page coverage by the California legal press,[15] Judge Pregerson and the panel refused Petitioner's request to reassign Petitioner's motion and self-determined and denied the motion. Judge Beezer filed a specially concurring opinion in which he concurred *only* as to denial of the request to recall the mandate, concluding the Court lacked jurisdiction to address whether Judge Pregerson was subject to enforcement of the mandatory recusal statute.

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[15] *See, e.g.*, front pages: *San Francisco Daily Journal*, Aug. 23, 2006, "9th Circuit's Pregerson Denies Stock Holdings Affected Cases"; *The Recorder*, Aug. 23, 2006, "Ninth Circuit Panel Rejects Conflict Call"; *The Recorder*, Jul. 11, 2006, "Conflict Claimed in Pregerson Rulings."

REASONS FOR GRANTING MANDAMUS

The cases of this Petition meet the customary requirements for a grant of writ of mandamus. *See* Supreme Court Rule 20. "To justify the granting of any such writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court." *Id.* The Petitioner has "the burden of showing that its right to issuance of the writ is 'clear and indisputable.'" *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953). This is precisely such a case: The Ninth Circuit's extraordinary failure to police its own Judges' adherence to the mandatory recusal provisions of 28 U.S.C. § 455 creates the exceptional circumstance requiring a writ of mandamus from this Court. *See La Buy v. Howes Leather Company,* 352 U.S. 249, 256 (1957) (approving mandamus should the Court find "that the rules have been practically nullified" by the lower court Judge).

It is well-settled that a mandamus petition is the proper procedure to review a lower court Judge for disqualification from a case in which he or she owns a financial interest or where there is an appearance of bias:

> A judge's refusal to recuse himself in the face of a substantial challenge casts a shadow not only over the individual litigation but over the integrity of the federal judicial process as a whole. . . In recognition of this point we have been liberal in allowing the use of the extraordinary writ of mandamus to review orders denying motions to disqualify.

Union Carbide Corp. v. U.S. Cutting Service, Inc., 782 F.2d 710, 712 (7th Cir. 1986) (citations omitted). *See also In re Corrugated Container Antitrust Litig.*, 614 F.2d 958, 961 n.4 (5th Cir. 1980); *In re Int'l Bus. Machines Corp.*, 618 F.2d 923, 926 (2d Cir. 1980) ("there are 'few situations more appropriate for mandamus than a judge's clearly wrongful refusal to disqualify himself'").

"[D]ue process * * * [requires] that a judge who is otherwise qualified to preside * * * must be sufficiently neutral and free of disposition to be able to render a fair decision." *Collins v. Dixie Transport, Inc.*, 543 So.2d 160, 166 (1989), citing *Berger v. United States*, 255 U.S. 22, 33 (1921); Wolfram, *Modern Legal Ethics* § 17.5.5 Independence and Neutrality, p. 989 (1986).

Mandamus is particularly appropriate here because the Judge failed to disclose his equity stake when he noted that Time Warner was identified in the Complaint and the pleadings. A Judge is always obligated to disclose a potential conflict, "even if the judge believes there is no real basis for disqualification." *See* Commentary to Canon 3E(1). Disclosure is "a separate obligation * * * that is broader than the duty to disqualify." *In the Matter of Edwards*, 694 N.E.2d 701, 711 (Ind. 1998).

A corporation is owned by its shareholders. When a Judge purchases stock in a corporation, he is taking sides, effectively becoming a part of that company's "team." A Judge may not rule for his own team: Recusal with an equity ownership is automatic, mandatory, and nonwaivable under the modern recusal statute. 28 U.S.C. § 455(b)(5) (automatic and mandatory recusal where Judge "[i]s a party to the proceeding" or "is known * * * to have an interest that could be substantially affected by the outcome of the proceeding"); 28 U.S.C. § 455(b)(4) (automatic and mandatory recusal where "he knows that he * * * has a financial interest in the subject matter in controversy or in a party to the proceeding"); § 455(e) (no waiver option for "any ground for disqualification enumerated in subsection (b)"). This is true even if the Judge owns a single share of stock. [16]

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[16] *See* www.uscourts.gov/ttb/jun98ttb/reminder.html. Ownership of a single share triggers a recusal requirement under the mandatory language of Canon 3 of the Code of Conduct for United States Judges. *See* Advisory Opinion 20. http://www.uscourts.gov/guide/vol2/20.html. This requirement extends to subsidiaries. Advisory Opinion No. 57. http://www.uscourts.gov/guide/vol2/57.html. *See* 28 U.S.C. § 455(d)(4).

The Judge refused to disqualify himself, the Ninth Circuit denied Petitioner's motion, and the Ninth Circuit refused to rehear the matter *en banc*. Thus, there is no adequate alternative means to obtain relief. Sup. Ct. Rule 20. A writ of mandamus is necessary to correct the unmistakable message that § 455 is not being enforced in the Ninth Circuit, or is otherwise being treated cavalierly by allowing a Judge to self-determine a motion for his own recusal.

I. Judge Pregerson Was Indisputably Subject to the Automatic and Mandatory Recusal Provisions of 28 U.S.C. § 455

Disqualification was mandatory because the Judge owned equity in the real defendant in interest and the subject matter in controversy. 15 U.S.C. §§ 455(a), 455(b)(4), 455(b)(5). Judge Pregerson denied his own disqualification by overlooking the period of infringement prior to the March 2004 WMG Transaction, weighing Time Warner's continuing ownership of convertible securities for a half-billion dollar stake in the affected division to find that such an interest was too indirect to present a conflict. The panel agreed, denying Petitioner's motion. This subjective test contradicted the statute, which requires automatic recusal for ownership of any financial interest, "however small." § 455(d)(4).

A. 28 U.S.C. § 455(b)(4) – Judge Pregerson's Equity Interest in Time Warner, Inc. Was a "Financial Interest" in the Subject Matter in Controversy or a Party to the Proceeding.

Adopting an argument similar to that of the conflicted Judge in *Liljeberg*, 486 U.S. at 868, Judge Pregerson acknowledged that he owned an equity interest in Time Warner, Inc., but denied knowledge of Time Warner's continuing interest in the Warner Music Group:

> Unbeknownst to me, Time Warner had an option (never exercised) to purchase up to 19.9% of Warner Music – also not a party to this suit. * * * War-

> ner Music owned Word Entertainment, not a party to this suit either. * * *

App. 1a-2a. In support of this statement, Judge Pregerson relied upon a November 24, 2003 article (from prior to the actual March 1, 2004 WMG Transaction) and a June 13, 2005 S.E.C. filing (from after Judge Pregerson presided over oral argument on February 7, 2005).[17] *Id.*

The Judge's lack of knowledge of Time Warner, Inc.'s continuing option interest suggests that he may have been unaware of the WMG Transaction *in toto*. If that is the case, Judge Pregerson could have simply believed that Time Warner, Inc. continued to own its music division. Judge Pregerson indisputably acknowledged his ownership of an equity interest in Time Warner, Inc. App. 1a, 4a. A reasonable person would conclude that Judge Pregerson knew of his financial interest in a real party in interest to the proceeding or the subject matter in controversy for *at minimum* the issues that arose, and for which liability accrued, in the period of infringement from March 1999 until the March 1, 2004 WMG Transaction. This time period included the TW-Word Acquisition, which Time Warner executed in 2002. ER39-4. Under § 455(b)(4), recusal was automatic, mandatory, and nonwaivable. *The Chase Manhattan Bank v. Affiliated FM Insurance Co.*, 343 F.3d 120, 138 (2d Cir. 2003).

B. 28 U.S.C. § 455(a) – There Was at Minimum an Appearance of Partiality.

The statute imposes upon the Judge a duty to remain informed about his financial interests. 28 U.S.C. § 455(c). Judge Pregerson's claim to the *Washington Post* that he did not know he owned Time Warner, Inc. after the AOL Time Warner merger does not overcome the

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[17] Whether the 2007 stock option for a 19.9% interest has been exercised, or subsequently sold, is irrelevant. Where a financial conflict of interest existed at any point in the appeal, all future orders are void. *Tramonte v. Chrysler Corp.*, 136 F.3d 1025 (5th Cir. 1998).

"appearance" test. *See The Chase Manhattan Bank*, 343 F.3d. at 130 ("a judge's 'forgetfulness' is not 'the sort of objectively ascertainable fact that can avoid the appearance of partiality'"), citing *Liljeberg*, 486 U.S. at 860. Knowledge is not required under § 455(a).

C. 28 U.S.C. § 455(b)(5) – Judge Pregerson Was a "Party" to the Proceeding

On January 4, 2002 Time Warner acquired Word Entertainment, exclusive distributor and facilitator of the alleged infringement. *M2Comm* ER39-4. Petitioner named Gaylord in the Complaint as Word's full owner at the time of launch and the entity already involved in the related proceeding at the Trademark Trial and Appeal Board (T.T.A.B. Opp. No. 91/124,775, filed Oct. 3, 2001). ER04-8-20. When Time Warner, Inc. took control of the infringing division in the alleged fraudulent transfer, Time Warner, Inc. "stepped into" Defendant's shoes. Judge Pregerson, as an equity owner of Time Warner, Inc., became a party in interest to his own case. *See, e.g.*, *Dacey v. Connecticut Bar Ass'n*, 184 Conn. 21, 28 (Conn. 1981). Knowledge is not required under § 455(b)(5).

II. The Published Orders Contradict the Opinions of the Federal Judiciary's Advisory Committee

A. The Mandatory Recusal Requirement is Not Limited to Named Parties

The modern recusal statute does not limit disqualifying conflicts to named parties. Yet, that is precisely the focus applied by Judge Pregerson in his decision not to fulfill his automatic duty to recuse. App. 1a-2a, 4a-5a ("not a party * * * not a party"). The Advisory Committee of the federal judiciary has unequivocally clarified that the statutory language "party to the proceeding" extends to mandatory recusal where a Judge

owns a "real party in interest" regardless of the parties formally named in the complaint.[18]

Judge Pregerson cited the disclosure requirement of Rule 26.1 to support his limitation of recusal analysis to named parties. App. 2a, 5a (noting that rule requires only listing of parties and "parent corporations and corporations that own 10% of the entities stock"). Such a narrow interpretation would not serve to promote justice if a Judge were to be able to point to the technicality of whether his conflict included a formally-named party while sitting on a case otherwise involving his financial interests. Judge Pregerson's citation of Rule 26.1 to support his limitation to named parties is contradicted by the Local Rules of other Circuits relating to this Rule. *See, e.g.*, Third Circuit LAR 26.1 ("If there is a publicly held corporation which is not a party to the proceeding but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests.").

Moreover, section 455(b)(4) also requires automatic and mandatory recusal where a Judge knows he owns a financial interest in the "subject matter in controversy." This clause extends precisely to situations like the present where a Judge owns a company that is identified in the complaint or the pleadings as the manufacturer or distributor of the infringing products. *See Compendium*, § 3.1-1(k) ("A judge owning stock in a company that is not a party but produces the product that is the subject of litigation should recuse where the judge's award could influence the initiation of subsequent claims against the company * * *"). It also encompasses the present case where a Judge owns a company that will be faced with an indemnification burden or other

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[18] *See Advisory Committee's Compendium of Selected Opinions on the Code of Conduct of United States Judges* (Guide to Judiciary Policies and Procedures, Vol. 2, Ch. V) ("*Compendium*"), § 3.1-1(h) (recusal where judge "owns stock *[in] a real party in interest in the litigation,*") citing "owns stock *in a party*" language of Advisory Opinion No. 20.

potential contributory liability depending upon the Judge's decision. *See, e.g., Sollenbarger v. Mountain States Tel. and Tel. Co.*, 706 F. Supp. 776, 779 (D. N.M. 1989) (disqualification required where the judge owned stock in non-party that could have faced liability depending on verdict). *See MLPSupp.*, at ¶2, Ex. 1 at 14 (S.E.C. filing acknowledging that Time Warner, Inc. would continue to administer Warner Music Group and indemnify it for willful misconduct after WMG Transaction).

B. The Modern Recusal Statute Does Not Allow a Judge Discretion to "Weigh" His Conflict but Requires Automatic Disqualification Where a Judge Owns a Financial Interest

Judge Pregerson ignored Time Warner, Inc.'s interest and potential liability from the infringement period prior to the 2004 WMG Transaction, and weighed as too "indirect" Time Warner, Inc.'s continuing interest and liability after the 2004 WMG Transaction. App. 2a, 5a. The modern recusal statute does not permit this type of subjective analysis: Congress did not intend to leave any discretion to a judge holding any financial interest. *Liljeberg*, 486 U.S. at 860 n.8. 28 U.S.C. § 455(b) sets forth specific situations in which disqualification is automatic, mandatory, and nonwaivable in order to "eliminate the uncertainty and ambiguity arising from the language in the existing statute * * *." H.R. Rep. No. 93-1453, reprinted in 1974 U.S.C.C.A.N. 6351, 6355. The Ninth Circuit should not have allowed Judge Pregerson's subjective weighing of the "directness" of conflict, as the statute unambiguously requires a Judge recuse with *any* financial interest in a party or the subject matter in controversy, "however small." § 455(b)(4).

C. Convertible Securities Must Be Treated As Stock for Recusal Analysis

Limiting his analysis to the post-2004 period, Judge Pregerson's concurring opinions fail to consider that a stock option interest creates the same conflict of interest as stock. After March 1, 2004, Time Warner

continued to own convertible securities for a 19.9% stake in Warner Music Group not due to expire until 2007. *Supra* n.1. The conflict presented can be illustrated by a hypothetical example whereby a 19.9% stake is purchased via option, on the one hand, and stock, on the other, in a company represented in total by 100,000 shares of a $100 per share stock. If 19,900 call options are purchased with a strike price of $50 per share (at a price of the intrinsic value ($100-$50=$50) plus a premium *p*)[19] and the stock gains to $125 per share, the new intrinsic value of the stock options will be $75. The owner of both instruments will realize the same gain of $25 per share, netting the same $497,500 profit on 19,900 shares (net of the option premium *p*).

The Advisory Committee has studied the issue of this potential financial equivalence and has concluded the same financial conflict is presented: "Convertible securities are treated as stock for recusal purposes." *Compendium*, § 3.1-5 (emphasis added).[20] The "benchmark" that triggers recusal is a 10% interest in a subsidiary by a parent corporation owned by a Judge. *Compendium*, § 3.1-1(f). Time Warner's equity interest control of a 19.9% stake via convertible securities is double the 10% benchmark. *Id.* Treating the option as stock, as the Advisory Committee instructs, required recusal.[21]

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[19] A stock option is valued by the difference between the stock price and strike price (the *intrinsic* value), plus a premium *p* that is primarily a function of time and volatility. *See Custom Chrome, Inc. v. Commissioner*, 217 F.3d 1117, 1125 (9th Cir. 2000) ("An option has two values: an intrinsic value and a time value.").

[20] The academic and medical research communities have also concluded that stock options present the same conflict as stock. *See, e.g. National Science Federation Grant Policy Manual* (NSF 05-131 July 2005), § 510. http://www.nsf.gov/pubs/manuals/gpm05_131/gpm5.jsp#510.

[21] The inapposite case cited by Judge Pregerson [App. 2a, 5a] to characterize the stock option as an "indirect" interest involved indirect bias stemming from criticism by political figures, not a financial interest. *See United States v. Bayless*, 201 F.3d 116, 127 (2d Cir. 2000).

III. Whether There Is a Greater Conflict in the *M2 Communications* Case or the *Madacy* Case, Recusal Is Required In Both

If conflict is shown in *M2Comm* (where Time Warner, Inc. was a direct 100% owner of the infringing division) it must also apply to *Madacy* (where Time Warner, Inc. served as co-creator, licensor, and manufacturer of the infringing line). Where resolution of one related case is tainted by an appearance of bias, all are tainted. *See In re Aetna Casualty & Surety Co.*, 919 F.2d 1136, 1143 (6th Cir. 1990) (recusal for all related cases: a "decision on the merits of any important issue in any of the seven cases * * * could constitute the law of the case in all of them, or involve collateral estoppel, or might be highly persuasive as precedent.") Recusal is necessary in related cases regardless of the order of the decisions, since an appearance of bias can be caused by a perception that a senior decision was rendered for "preclusive effect" in a subsequent case of conflict. *See Gordon v. Reliant Energy, Inc.*, 141 F.Supp. 2d 1041, 1044-46 (S.D. Cal. 2001). The same considerations apply here, where *M2Comm 2005* and *Madacy 2005* were heard together, and the junior decision relied on the senior decision for foundational determinations. *See M2Comm 2005,* 149 Fed.Appx. at 614 (citing *Madacy 2005*).

IV. Judge Beezer's Specially Concurring Opinion Contradicts *Liljeberg* Because Judge Beezer Fails to Recognize That the Issue Is Nondiscretionary

Judge Beezer did not fully concur with Judge Pregerson's analysis. The Ninth Circuit's Orders of August 21, 2006 decided several components:

1.) A motion to recall the mandate, vacate the opinion, and reassign the appeals to a new properly constituted panel (DENIED, App. 1a, 4a);
2.) A request that the recusal motion be assigned to a new panel (DENIED, *Id.*); and
3.) Defendants' request for sanctions (DENIED, *Id.*).

Judge Beezer, "specially concurring," concurred with only two components of the Orders:

> I concur in the court's order denying the motion to recall the mandate and the denial of the motion for sanctions. Because the mandate is not recalled, I believe we have no jurisdiction to address the challenge to Judge Pregerson's participation in this appeal.

App. 2a-3a, 5a-6a (emphasis added). By finding that the Ninth Circuit had "no jurisdiction" to address the 28 U.S.C. § 455 challenge, Judge Beezer avoided having to answer any of the questions raised herein as to Judge Pregerson's violation of the mandatory recusal statute.

Instead, Judge Beezer's special concurrence suggested that the higher standards for a motion to recall ("fraud * * * gross misconduct * * * manifestly unconscionable") should apply if the basis for recusal is not discovered until after the conflicted Judge has delivered his opinion. App. 3a, 6a. Judge Beezer's position contradicted this Court's earlier precedent of *Liljeberg* in which this Court rejected a similar argument:

> But to the extent the provision can also, in proper cases, be applied retroactively, the judge is not called upon to perform an impossible feat. Rather, he is called upon to rectify an oversight and to take the steps necessary to maintain public confidence in the impartiality of the judiciary. If he concludes that "his impartiality might reasonably be questioned," then he should also find that the statute has been violated. This is certainly not an impossible task. No one questions that Judge Collins could have disqualified himself and vacated his judgment when he finally realized that Loyola had an interest in the litigation.

Liljeberg, 486 U.S. at 861 (emphasis added).

Judge Beezer's alternative position that judicial equities – "the interests of finality and repose" – would prevent a 28 U.S.C. § 455 motion from being brought after judgment disregards that the issue is nondiscretionary and that a conflicted Judge holds control of timing:

> [The Judge's] failure to disqualify himself * * * also constituted a violation of § 455(b)(4) * * * further compels the conclusion that vacatur was an appropriate remedy; by his silence, [the Judge] deprived respondent of a basis for making a timely motion * * * [and] deprived it of an issue on direct appeal.

Liljeberg, 486 U.S. at 867-68. *Cf.* App. 3a, 6a.

This Court noted that if a Judge had properly disclosed his interest "when his knowledge * * * was renewed, respondent could have raised the issue * * * on appeal without requiring that the case be reopened." *Id.* at 863 n.11. Judge Pregerson knew of his ownership of Time Warner, Inc. at the latest when he filed his disclosure statements. *Supra*, Table II. Even if this were not true, Judge Pregerson specifically noted his ownership of Time Warner, Inc. stock in a *Washington Post* interview that took place on or before April 17, 2006 – possibly before the certiorari ruling, and indisputably before the rehearing ruling of June 12, 2006. U.S.S.C. 05-967. Judge Pregerson should have "disqualified himself and vacated his judgment" at that time. *Liljeberg*, 486 U.S. at 861. As in *Liljeberg*, disclosure even at that late date would have eliminated the need to reopen the case and confront the interests of "finality and repose" of Judge Beezer's concern. App. 3a, 6a.

This is the rare case where a difficult-to-discover nondisclosure has been brought to light. The *only* check or balance for the Court of Appeals' compliance with 28 U.S.C. § 455 disclosure provisions is a Petition like the present. The signal sent by the Ninth Circuit published Orders is that the best strategy for an Appeals Court Judge is <u>never to disclose</u> a conflict: If the affected party happens to discover the conflict in the weeks or months after judgment, applying Judge Beezer's opinion, the Judge is free and clear and the ruling must stand no matter how great the appearance of bias or how egregious the conflict because "the interests of finality and repose" will ultimately control. App. 3a, 6a. Such a rule

is extraordinarily unfair to the party who must stand with a decision rendered by a conflicted judge, and threatens to destroy public confidence in the judiciary.

The Constitutional right to have one's case decided by an impartial adjudicator is "among those basic fair trial rights that can never be treated as harmless." *Gomez v. United States*, 490 U.S. 858, 876 (1989). "[T]he Due Process Clause of the Constitution entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). *See also Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 831 (1986); *Liljeberg*, 486 U.S. at 865 n.12; *Tumey*, 273 U.S. at 523. Where a person is deprived of a properly-constituted panel, "the judgment must be set aside." *See United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 690-691 (1960). *See also Compendium*, § 3.1-1(e) ("The fact * * * that recusal would involve great inconvenience is immaterial; recusal is mandatory.").[22] Recusal here was automatic, mandatory, and nonwaivable. The Ninth Circuit derogated its duty to enforce the nondiscretionary statute. A writ of mandamus is required to ensure that 28 U.S.C. § 455 will be followed by the Courts of Appeals now and in the future to promote the appearance of justice.[23]

---

[22] This Petition is not a referendum on the character of Judge Pregerson, who has devoted many years of otherwise conflict-free service to the bench. A violation of §455 does not depend on proof that the conflict affected the Judge's actions. See *Miller Industries, Inc. v. Caterpillar Tractor Co.*, 516 F.Supp. 84, 90 n.2 (S.D.Ala.1980) (extending to Judge Hand a "welcome to the club" of judgments required to be vacated). *See also The Chase Manhattan Bank*, 343 F.3d at 128. The mandatory language of 28 U.S.C. §455 places upon the Judge the duty to recuse. *Sao Paulo State v. Am. Tobacco Co.*, 535 U.S. 229 (2002).

[23] At minimum, this Court should summarily reverse under Rule 16.1 to require enforcement of the mandatory recusal statute. Sup. Ct. Rule 16.1 Close questions must be decided in favor of recusal. *See Republic of Pan. v. American Tobacco Co.*, 217 F.3d 343, 347 (5th Cir. 2000); *In re United States*, 158 F.3d 26, 30 (1st Cir. 1998); *Nichols v. Alley*, 71 F.3d 347, 352 (10th Cir. 1995).

CONCLUSION

Accordingly, for the foregoing reasons, the petition for a writ of mandamus should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-56602
D.C. No. CV-02-01588-AHM
Central District of California, Los Angeles

Filed August 21, 2006

M2 SOFTWARE INC.,
a Delaware corporation, Plaintiff-Appellant,

v.

M2 COMMUNICATIONS, L.L.C., a limited liability company; JEFF MOSELEY, an individual; GAYLORD ENTERTAINMENT, INC., a corporation, Defendants-Appellees.

***1* ORDER

Before PREGERSON, CANBY, and BEEZER, Circuit Judges.

Appellant M2 Software's motion to recall the mandate and vacate the opinion in the above case is DENIED. M2 Software's request that the recusal motion be assigned to a new panel is DENIED. M2 Communications' request for sanctions against M2 Software is also DENIED.

***2 *869* PREGERSON, Circuit Judge, specially concurring:

I concur in the court's order.

To set the matter straight, at the time this case was assigned to this panel and at the time we decided it, I owned an equitable interest in Time Warner. Time Warner was not a party to the suit. Unbeknownst to

me, Time Warner had an option (never exercised) to purchase up to 19.9% of Warner Music - also not a party to this suit. See David A. Vise, *Time Warner Sells Music Unit to Bronfman for $2.6B*, Wash. Post, Nov. 24, 2003. Warner Music owned Word Entertainment, not a party to this suit either. See 10-Q filing for Warner Music Group, at 7 (June 13, 2005), *available at* http://www.sec.gov/Archives/ edgar/data/1319161/000104746905017103/0001047469-05-017103-index.htm. Word Entertainment had an exclusive distribution contract with M2 Communications, a small Christian music label and a party to this suit. See Word Entertainment, *available at* http://www.wmg.com/recordedmusic/?promo=24020007.

In sum, then, I had no interest "however small" in the subject matter in controversy. Instead, I had an interest in a company (a) that had an *option* to purchase 19.9% of a company (b) that owned a company (c) that *contracted* with a ***3* party to this suit. Such an indirect interest does not require recusal. See *United States v. Bayless*, 201 F.3d 116, 127 (2d Cir.2000) ("Disqualification is not required on the basis of remote, contingent, indirect or speculative interests.") (citations omitted). Indeed, M2 Communications was not required to list, and did not list, Time Warner or Warner Music on its Federal Rule of Appellate Procedure 26.1 disclosure, which requires the parties to list only parent corporations and corporations that own 10% of the entity's stock.

Accordingly, I had no financial interest in the subject matter of this suit that required recusal under § 455(b). Nor, given the remote nature of my interest, could my impartiality reasonably have been called into question, and thus recusal is not required under § 455(a).

***4* BEEZER, Circuit Judge, specially concurring:

I concur in the court's order denying the motion to recall the mandate and the denial of the motion for

sanctions. Because the mandate is not recalled, I believe we have no jurisdiction to address the challenge to Judge Pregerson's participation in this appeal.

M2 Software, Inc. moves the court for an order recalling the mandate and vacating the opinion. Appellant's counsel asserts that Judge Pregerson owns stock in Time Warner, Inc. and that such ownership required his recusal from participation in the decision of the case pursuant to 28 U.S.C. § 455.

Our authority to recall a mandate is to be "exercised only in extraordinary circumstances" and the "sparing use of the power demonstrates that it is one of last resort, to be held in reserve against grave, unforeseen contingencies." *Calderon v. Thompson*, 523 U.S. 538, 550, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998). When a motion to recall a mandate is based on allegations of fraud on the court or allegations of misconduct affecting the integrity of the judicial process, the harm must be "gross" and enforcement of the judgment "manifestly unconscionable." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245, 64 S.Ct. 997, 88 L.Ed. 1250 (1944), *overruled on other grounds, Standard Oil Co. of Cal. v. United States*, 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976).

***5* Nothing presented by M2 Software suggests perpetration of fraud, gross misconduct or that enforcement of the judgment **870* would be manifestly unconscionable. Nor is the motion to recall the mandate "grounded in any real infirmity in our previous decision, either when it was entered or when it is viewed in light of later Supreme Court decisions." *Nevius v. Sumner*, 105 F.3d 453, 460-61 (9th Cir.1996). The Supreme Court has twice considered the opinions of this panel in this matter and has twice denied certiorari. The interests of finality and repose balanced against the claims of M2 Software require denial of the motion to recall the mandate.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-55957
D.C. No. CV-00-02853-AHM
Central District of California, Los Angeles

Filed August 21, 2006

M2 SOFTWARE INC.,
a Delaware corporation, Plaintiff-Appellant,

v.

MADACY ENTERTAINMENT, a corporation; HANDLEMAN COMPANY, a corporation; SFX ENTERTAINMENT, a corporation, Defendants-Appellees.

***1** ORDER

Before PREGERSON, CANBY, and BEEZER, Circuit Judges.

Appellant M2 Software's motion to recall the mandate and vacate the opinion in the above case is DENIED. M2 Software's request that the recusal motion be assigned to a new panel is DENIED. Madacy Entertainment's motion for sanctions against M2 Software is also DENIED.

***2** PREGERSON, Circuit Judge, specially concurring:

I concur in the court's order.

To set the matter straight, at the time this case was assigned to this panel and at the time we decided it, I owned an equitable interest in Time Warner. Time Warner was not a party to the suit. Unbeknownst to

me, Time Warner had an option (never exercised) to purchase up to 19.9% of Warner Music-also not a party to this suit. See David A. Vise, *Time Warner Sells Music Unit to Bronfman for $2.6B*, Wash. Post, Nov. 24, 2003. Warner Music owns Warner Special Products, not a party to the suit either. See Warner Special Products FAQ's, *available at* http://www.warner specialproducts.com/wsp/ wcm_help/helpfaq.jsp. As indicated on the allegedly infringing CDs at issue in this case, Warner Special Products manufactured, produced, and licensed music for a division of Madacy, a party to this suit.

In sum, then, I had no interest "however small" in the subject matter in controversy. Instead, I had an interest in a company (a) that had an *option* to purchase 19.9% of a company (b) that owned a company (c) that manufactured, produced, and licensed music for a corporate division of a party to this suit. Such an indirect interest does not require recusal. See *United States v. Bayless*, 201 F.3d 116, 127 (2d Cir.2000) ***3* ("Disqualification is not required on the basis of remote, contingent, indirect or speculative interests.") (citations omitted). Indeed, Madacy was not required to list, and did not list, Time Warner or Warner**871* Music on its Federal Rule of Appellate Procedure 26.1 disclosure, which requires the parties to list only parent corporations and corporations that own 10% of the entity's stock.

Accordingly, I had no financial interest in the subject matter of this suit that required recusal under § 455(b). Nor, given the remote nature of my interest, could my impartiality reasonably have been called into question, and thus recusal is not required under § 455(a).

***4* BEEZER, Circuit Judge, specially concurring:

I concur in the court's order denying the motion to recall the mandate and the denial of the motion for sanctions. Because the mandate is not recalled, I believe

we have no jurisdiction to address the challenge to Judge Pregerson's participation in this appeal.

M2 Software, Inc. moves the court for an order recalling the mandate and vacating the opinion. Appellant's counsel asserts that Judge Pregerson owns stock in Time Warner, Inc. and that such ownership required his recusal from participation in the decision of the case pursuant to 28 U.S.C. § 455.

Our authority to recall a mandate is to be "exercised only in extraordinary circumstances" and the "sparing use of the power demonstrates that it is one of last resort, to be held in reserve against grave, unforeseen contingencies." *Calderon v. Thompson*, 523 U.S. 538, 550, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998). When a motion to recall a mandate is based on allegations of fraud on the court or allegations of misconduct affecting the integrity of the judicial process, the harm must be "gross" and enforcement of the judgment "manifestly unconscionable." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245, 64 S.Ct. 997, 88 L.Ed. 1250 (1944), *overruled on other grounds, Standard Oil Co. of Cal. v. United States*, 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976). ***5*

Nothing presented by M2 Software suggests perpetration of fraud, gross misconduct or that enforcement of the judgment would be manifestly unconscionable. Nor is the motion to recall the mandate "grounded in any real infirmity in our previous decision, either when it was entered or when it is viewed in light of later Supreme Court decisions." *Nevius v. Sumner*, 105 F.3d 453, 460-61 (9th Cir.1996). The Supreme Court has twice considered the opinions of this panel in this matter and has twice denied certiorari. The interests of finality and repose balanced against the claims of M2 Software require denial of the motion to recall the mandate.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-56602
D.C. No. CV-02-01588-AHM
Central District of California, Los Angeles

Filed October 26, 2006

M2 SOFTWARE INC.,
a Delaware corporation, Plaintiff-Appellant,

v.

M2 COMMUNICATIONS, L.L.C., a limited liability company; JEFF MOSELEY, an individual; GAYLORD ENTERTAINMENT, INC., a corporation, Defendants-Appellees.

****1** ORDER

Before: Judge PREGERSON, CANBY, and BEEZER, Circuit Judges.

Judge Pregerson has voted to deny appellant's petition for rehearing en banc. Judges Canby and Beezer have recommended that the petition for rehearing en banc be denied.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested en banc rehearing. See Fed. R. App. P. 35(b).

The petition for rehearing en banc filed September 28, 2006 is DENIED.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-55957
D.C. No. CV-00-02853-AHM
Central District of California, Los Angeles

Filed October 26, 2006

M2 SOFTWARE INC.,
a Delaware corporation, Plaintiff-Appellant,

v.

MADACY ENTERTAINMENT, a corporation; HANDLEMAN COMPANY, a corporation; SFX ENTERTAINMENT, a corporation, Defendants-Appellees.

****1** ORDER

Before: Judge PREGERSON, CANBY, and BEEZER, Circuit Judges.

Judge Pregerson has voted to deny appellant's petition for rehearing en banc. Judges Canby and Beezer have recommended that the petition for rehearing en banc be denied.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested en banc rehearing. See. Fed. R. App. P. 35(b).

The petition for rehearing en banc filed September 28, 2006 is DENIED.

APPENDIX E

Amendment V, United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX F

28 U.S.C. § 455

Disqualification of justice, judge, or magistrate judge.

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization

is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

APPENDIX G

28 U.S.C. § 46

Assignment of judges; panels; hearings; quorum.

a) Circuit judges shall sit on the court and its panels in such order and at such times as the court directs.

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness. Such panels shall sit at the times and places and hear the cases and controversies assigned as the court directs. The United States Court of Appeals for the Federal Circuit shall determine by rule a procedure for the rotation of judges from panel to panel to ensure that all of the judges sit on a representative cross section of the cases heard and, notwithstanding the first sentence of this subsection, may determine by rule the number of judges, not less than three, who constitute a panel.

(c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95–486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible (1) to participate, at his election and upon designation and assignment

pursuant to section 294 (c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member, or

(2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service.

(d) A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum.

APPENDIX H

28 U.S.C. § 144

Bias or prejudice of judge.

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

2 No. 06-846

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JAN 18 2007
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SUPREME COURT, U.S.

In The

Supreme Court of the United States

IN RE M2 SOFTWARE, INC.,

Petitioner.

On Petition For A Writ Of Mandamus To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

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QUESTION PRESENTED

1. Whether Judge Pregerson held a "direct financial interest" in the subject matter in controversy sufficient to require his mandatory recusal under 28 U.S.C. § 455, and, if so, whether such recusal should require the Ninth Circuit to recall the mandate and reassign the underlying appeal.

LIST OF PARTIES AND RULE 29.6 LISTING

Respondent/Real Party in Interest M2 Communications, L.L.C.'s ("Respondent") name was changed to INO Records, L.L.C. It is a wholly owned subsidiary of Integrity Media, Inc.

As the question presented does not involve the Ninth Circuit's decision to dismiss defendant Jeff Moseley for lack of jurisdiction, *see M2 Software, Inc. v. M2 Communications, L.L.C.*, 149 Fed.Appx. 612, 615 (9th Cir. September 12, 2005), *reh'g en banc denied* (9th Cir. Nov. 1, 2005), he is not properly listed as a real party in interest. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 579 n.3 (1986).

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BRIEF IN OPPOSITION FOR REAL PARTY IN INTEREST M2 COMMUNICATIONS, L.L.C.

I. STATEMENT OF THE CASE

This is a trademark infringement action brought by Plaintiff/Petitioner M2 Software, Inc.

M2 Software's Petition follows the Ninth Circuit's denial of its motion to recall the mandate, vacate the opinion, and reassign the underlying appeal in *M2 Software, Inc. v. M2 Communications, L.L.C.*, 463 F.3d 868 (9th Cir. 2006) (*see* Petitioner's Appx. "A") (hereinafter "*M2 Communications*") and denial of Petitioner's request for a rehearing *en banc* of the issue (*see* Petitioner's Appx. "C").

M2 Software's motion is based on the fact that a Ninth Circuit panelist, Judge Pregerson, owned stock in Time Warner during the reporting period covered by January 1, 2003 through December 31, 2004. (Pettinari Decl., Exh. 2 at 8, 11).[1]

M2 Communications, L.L.C. is a distributor of Christian music recordings, some of which were distributed under its "M2.0" label. (SER 0159-61, 0385-86.)[2] M2 Software alleged that M2 Communications infringed M2 Software's "M2" trademark. M2 Software also alleged that

---

[1] At the July 20, 2006, market valuation of Time Warner, the amount of stock owned by Judge Pregerson would have been less than 0.000022 percent of the company. (Dec. of David K. Caplan In Supp. of Opp. to Mot. to Recall Mandate, Exh. 3.)

[2] Citations to "ER" are to Petitioner's Excerpts of Record before the Ninth Circuit; Citations to "SER" are to Real Party in Interest M2 Communications' Supplemental Excerpts of Record Before the Ninth Circuit.

Word Entertainment infringed M2 Software's trademark through distribution of M2 Communications' products pursuant to a distribution agreement. (ER 65-2/16). Based on this allegation regarding Word Entertainment, M2 Software sued Gaylord Entertainment Company, the parent company of Gaylord Creative Group, Inc., which in turn owned Word Music Group, Inc. Until its sale in January 2002, Word Entertainment was a wholly owned subsidiary of Word Music Group, Inc. Thus, until January 2002, the defendant Gaylord was the great-grandparent company of the alleged infringer Word Entertainment.

In or about November 2001, three months prior to the filing of the complaint in *M2 Communications*, defendant Gaylord announced the sale of Word Entertainment to Warner Music Group. (ER 58-31). That sale closed in January 2002, one month prior to the filing of the action. (ER 58-31; ER 90-2). Gaylord informed M2 Software of this sale in March 2002. (ER 58-44). At the time that M2 Software served Gaylord with the complaint in *M2 Communications*, in June 2002, it was aware that Word Entertainment was owned by Warner Music Group, which at that time, was owned by Time Warner, Inc. Indeed, based on this sale to Warner Music Group, M2 Software claimed that Gaylord committed a fraudulent transfer under Cal. Civ. Code § 3439.01. (ER 4-17.) Notably, M2 Software never sued Warner Music Group or Time Warner. Indeed M2 Software never even sued Word Entertainment, nor its parent, Word Music Group, Inc., nor its parent Gaylord Creative Group, Inc.

On August 1, 2003, the District Court issued its Summary Judgment Order in which it granted summary judgment to M2 Communications. On September 19, 2003,

M2 Software filed its amended notice of appeal of the summary judgment and jurisdiction decisions.

On November 24, 2003, Time Warner announced that it had sold Warner Music Group (the parent of Word Entertainment).[3] (Dec. of David K. Caplan In Supp. of Opp. to Mot. to Recall Mandate, Exh. 1.)

On December 24, 2003, M2 Software filed its Opening Brief. On March 3, 2004, M2 Communications filed its Answering Brief. On April 1, 2004, M2 Software filed its Reply Brief.

On November 10, 2004, a calendar check was performed in the Ninth Circuit to assign the case for oral argument. On November 30, 2004, over nine months after the sale of Warner Music Group by Time Warner, the case was calendared for argument. On February 7, 2005, the case was argued and submitted to Judge Harry Pregerson, Judge William C. Canby, and Judge Robert R. Beezer of the Ninth Circuit. On September 12, 2005, the Ninth Circuit issued its Memorandum affirming the District Court's decisions. On September 26, 2005, M2 Software filed its petition for rehearing and rehearing *en banc* which was denied by the Ninth Circuit on November 1, 2005. On November 8, 2005, the mandate issued. On January 30, 2006, M2 Software filed a petition for a writ of certiorari in *M2 Communications*. The Supreme Court denied this petition on April 17, 2006. On May 12, 2006, M2 Software filed its petition for rehearing in *M2 Communications*, which was denied by the Supreme Court on June 12, 2006.

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[3] On February 27, 2004, this deal was completed. (Dec. of Mark L. Pettinari in Supp. of Mot. to Recall).

On July 7, 2006, M2 Software filed its motion to recall the mandate which is at issue in its Petition. On August 21, 2006, in a published decision the Ninth Circuit denied the motion to recall the mandate. 463 F.3d 868. On September 28, 2006, M2 Software filed its petition for rehearing and rehearing *en banc* which was denied by the Ninth Circuit on October 26, 2006. The Ninth Circuit issued its mandate on November 27, 2006, which was followed by the filing of the Petition by M2 Software.

II. REASONS FOR DENYING THE WRIT

A. Introduction.

Petitioner M2 Software, Inc.'s request should be denied for the following reasons: (1) There are no extraordinary reasons to warrant the drastic remedy of recalling the mandate; (2) Petitioner's argument is based on a question of fact, namely, whether Judge Pregerson held a "direct financial interest" in the subject matter in controversy; and (3) There is no conflict between the Circuits on the issue raised by Petitioner and the precedential value of this case, as with any case considering fact-specific issues, is *de minimis*.

The basis for the instant Petition arises out of Judge Pregerson's alleged "direct financial interest" in *M2 Communications*. Judge Pregerson owns stock in Time Warner, which M2 Software identifies as the "active moving force" behind the alleged infringement. In fact, Time Warner has no relationship to this case. From the time Judge Pregerson was assigned to the *M2 Communications* action, Time Warner has been the *former* grandparent company of a *former* great-grandchild company

(Word Entertainment) of a defendant (Gaylord Entertainment). Time Warner has no relevance to this case.

Indeed, whether Judge Pregerson held such interest is a question of fact which has been decided by a panel of three Circuit Court judges and affirmed in the denial of M2 Software's petition for *en banc* review. The issue has been fully and finally decided. As Judge Pregerson confirmed in his concurrence in *M2 Communications*, he held only an equitable, contingent interest "in a company (a) that had an *option* to purchase 19.9% of a company (b) that owned a company (c) that *contracted* with a party to this suit," which interest was unknown to Judge Pregerson at the time the orders Petitioner seeks to vacate were entered. (*See* Petitioner's Appx. "A" at 2a.) As such, Judge Pregerson had no financial interest in the subject matter in controversy sufficient to warrant his recusal under 28 U.S.C. § 455(a) or (b). *See United States v. Bayless*, 201 F.3d 116, 127 (2d Cir. 2000) ("Disqualification is not required on the basis of remote, contingent, indirect or speculative interests.") (citations omitted).

This Court established the requirements for an analysis of conflicts in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 861 (1988). In light of the clear decision in *Liljeberg*, a decision in this case will be of no precedential value beyond this case.

This Court should deny the Petition.

B. There Are No Extraordinary Circumstances Warranting the Recall of the Mandate in This Case.

"In light of the 'profound interests in repose' attaching to the mandate of a court of appeals, the power [to recall the mandate] can be exercised only in extraordinary circumstances. . . . The sparing use of the power demonstrates it is one of last resort, to be held in reserve against grave, unforeseen contingencies." *Calderon v. Thompson*, 523 U.S. 538, 550 (1998) (*quoting* 16 C. Wright, A. Miller, & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3938, p. 712 (2d. ed. 1996).

Moreover, when a motion to recall a mandate is based on allegations of misconduct affecting the integrity of the judicial process, the harm must be "gross" and enforcement of the judgment "manifestly unconscionable." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245 (1945), *overruled on other grounds*, *Standard Oil Co. of Cal. v. United States*, 429 U.S. 17 (1976).

Recognizing this principle, the First Circuit stated that "If we were in error in this case, of which we are not presently persuaded, we believe it would be far greater error to permit reconsideration now after denial of petitions for rehearing and certiorari. There must be an end to dispute." *Boston & Maine Corp. v. Town of Hampton*, 7 F.3d 281, 283 (1st Cir. 1993).

M2 Software's Petition fails to establish that this case presents any "grave, unforeseen contingencies." *Calderon*, 523 U.S. at 550. Judge Pregerson's ownership of a negligible amount of stock in a company (1) which is not a party, (2) whose strained multi-layer distal relationship to this case ended over nine months prior to Judge Pregerson

being assigned to hear this case, and (3) which despite M2 Software's claim that it is the "active driving force" behind the alleged trademark infringement, was never sued by M2 Software, is not such an extraordinary circumstance.

Thus, this Court should deny the Petition.

C. Disqualification of Judge Pregerson Is Not Warranted Under 28 U.S.C. § 455(a).

Title 28 U.S.C. § 455(a) provides that "any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The Supreme Court has held that § 455(a) applies where the judge lacks knowledge of the facts indicating the judge's interest in the case "if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. at 861; *F.J. Hanshaw Enterprises, Inc. v. Emerald River Develop., Inc.*, 244 F.3d 1128, 1144 (9th Cir. 2001). To warrant disqualification, the movant must show that "an objective, disinterested observer fully informed of the underlying facts [would] entertain significant doubts that justice would be done absent recusal." *United States v. Lauersen*, 348 F.3d 329, 334 (2d Cir. 2003) (citation omitted); *see also New York City Develop. Corp. v. Hart*, 796 F.2d 976, 980 (7th Cir. 1986) ("the inquiry is objective, from the point of view of a reasonable person with access to all of the facts").

> Where a case . . . involves remote, contingent, indirect or speculative interests, disqualification is not required. . . . Moreover, where the standards governing disqualification have not been met,

> disqualification is not option; rather it is prohibited. As we have stated, a judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is.

In re Aguinda, 241 F.3d 194, 201 (2nd Cir. 2001).

While a showing of knowledge is not required under § 455(a), "there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance." *Liljeberg*, 486 U.S. at 862. *See also Lauersen*, 348 F.3d at 334 (no recusal required where a trial judge's wife owned shares which represented .00009 percent of a company entitled to restitution in the case); *O'Regan v. Arbitration Forms, Inc.*, 246 F.3d 975, 988 (7th Cir. 2001) (no recusal required where no reasonable person, in fact no person other than the "hypersensitive, cynical, and suspicious person," would question the tribunal's impartiality); *United States v. Rogers*, 119 F.3d 1377, 1384 (9th Cir. 1997) (no recusal required where judge held a limited financial interest in controversy "as one of millions of stockholders in Bank of America. . . . [thus] no reasonable person with knowledge of all these facts would objectively conclude that the judge's impartiality might reasonably be questioned").

Assuming *arguendo* that Time Warner ever had any relationship to this case, Judge Pregerson owned less than one quarter of the amount of Time Warner than the amount which the court in *Lauersen* found to be a "slight interest, even less significant than the interest termed 'nonexistent'." *Lauersen*, 348 F.3d at 335; *see also Rogers*, 119 F.3d at 1384.

Furthermore, the purported relationship between Time Warner and this case ended at least nine months

before Judge Pregerson was assigned to this case when Time Warner, Inc. sold Warner Music Group.

The plain fact is that Time Warner has nothing to do with this case. Time Warner is the former parent company of a purchaser of a company (Warner Music Group) which was the great-grandchild (Word Entertainment) of a defendant (Gaylord Entertainment Company). Notwithstanding Petitioner's current protestations regarding the importance of Time Warner, Time Warner's lack of involvement is established by M2 Software's own inaction. Despite its knowledge that Warner Music Group purchased Word Entertainment before it served the complaint on Gaylord, M2 Software never sued Warner Music Group. M2 Software likewise never sued Word Entertainment itself or its first parent, Word Music Group, Inc., or its grand-parent company, Gaylord Creative Group, Inc.

Finally, a review of the evidence of Judge Pregerson's conduct also would not merit a reasonable person's suspicion. As this Court has stated, "there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance." *Liljeberg*, 486 U.S. at 862. M2 Software fails to show any unreasonable conduct by Judge Pregerson.

Thus, the Petition should be denied.

D. Disqualification of Judge Pregerson Is Not Warranted Under 28 U.S.C. § 455(b)(4).

M2 Software also asserts that recusal was required under 28 U.S.C. § 455(b)(4). Section 455(b)(4) provides, in relevant part, that a judge shall disqualify himself when: He knows that he . . . has a financial interest in the

subject matter in controversy or in a party to the proceeding.

As distinguished from § 455(a), to warrant recusal under § 455(b)(4), the judge must have actual knowledge of a financial interest. *Liljeberg*, 486 U.S. at 859. Judge Pregerson did not know he owned stock in Time Warner. (Pettinari Decl., Exh. 1 at 3.) M2 Software cites nothing to the contrary. Both *Liljeberg* and *Chase Manhattan Bank* applied § 455(a), not 455(b)(4), and each involved circumstances whereby an objective person would question the judge's impartiality. *Liljeberg*, 486 U.S. at 861; *Chase Manhattan Bank v. Affiliated FM Insurance Co.*, 343 F.3d 120, 130 (2nd Cir. 2003).

There is no evidence that Judge Pregerson (1) knew he owned Time Warner stock, or (2) if he did, knew that Time Warner was involved in this litigation (which it is not). Disqualification under § 455(b)(4) is not warranted.

E. Disqualification of Judge Pregerson Is Not Warranted Under 28 U.S.C. § 455(b)(5)(i).

28 U.S.C. § 455(b)(5)(i) provides, in relevant part, that a judge shall disqualify himself where "he . . . or a person within the third degree of relationship . . . is a party to the proceeding, or an officer, director, or trustee of a party." M2 Software argues that Judge Pregerson violated 28 U.S.C. § 455(b)(5)(i) because Time Warner was somehow a "party" to the proceeding.

The language of the statute makes clear the prohibition is limited to actual parties. Section (b)(4) addresses the issue of financial interest, such as stockholding, and specifically requires knowledge. Section (b)(5)(i) addresses

situations where the judge is a party to the proceeding. If the statute intended to make ownership of stock (or, as here, ownership of stock of a company that has a contingent right to purchase ownership of a company that is a former grandparent of a company which contracted with a party to the proceeding) sufficient to make a judge a "party," section (b)(4) would be extraneous as would section (b)(5)(i)'s specification of officers, directors, or trustees.

The term "party" means "[o]ne who takes part in a transaction." Black's Law Dictionary (8th ed. 2004). *See also* Jones, Rosen, Wegner & Jones, RUTTER GROUP PRACTICE GUIDE: FEDERAL CIVIL TRIALS & EVIDENCE (The Rutter Group 2006) ("The term 'party' means a party to the litigation.") Neither Time Warner, its former subsidiary Warner Music Group, nor Judge Pregerson, have ever been a party to the action. Disqualification under § 455(b)(5)(i) is not warranted.

F. Due Process Is Not At Issue.

M2 Software asserts that it has been deprived of Due Process. However, M2 Software has had its day in court. Each one of its claims have been examined and then reexamined. M2 Software filed a motion for preliminary injunction which was denied, and which denial was upheld by the Ninth Circuit. M2 Software opposed M2 Communications' motion for summary judgment and lost. That loss was reviewed by the Ninth Circuit twice, and the Supreme Court twice, and was upheld each time. M2 Software's claim that Judge Pregerson was biased was examined and rejected by the three judge panel.

Because Plaintiff has not been deprived due process, and because the Ninth Circuit followed the requirements of 28 U.S.C. § 455, this Court should deny the Petition.

III. CONCLUSION

For the foregoing reasons, this Court should deny M2 Software's Petition.

Respectfully submitted,

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No. 06-846

In the Supreme Court of the United States

In re M2 SOFTWARE, INC.

M2 SOFTWARE, INC.,
Petitioner,

v.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (Real Parties In Interest: Madacy Entertainment, Handleman Company, SFX Entertainment, M2 Communications, L.L.C., Gaylord Entertainment, Jeffory Moseley)
Respondents

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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QUESTION PRESENTED

1. Whether this Court should grant mandamus to direct the United States Court of Appeals for the Ninth Circuit to enforce the nondiscretionary, automatic and mandatory recusal statute of 28 U.S.C. § 455 to recall the mandates, vacate the judgments, and reassign the underlying appeals where the authoring Judge held a direct financial interest in the subject matter in controversy and in a real party in interest to the proceedings.

RULE 29.6 STATEMENT

The Rule 29.6 Statement of Petitioner M2 Software, Inc. is set forth in the Petition for Writ of Mandamus entered on the docket on December 19, 2006.

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RULES

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In its Petition for Writ of Mandamus ("Pet."), M2 Software, Inc. ("M2") identifies a plain violation of the mandatory recusal statute by a Court of Appeals judge that resulted in a structural due process violation. The arguments now raised by Respondent M2 Communications, L.L.C. in its Brief In Opposition ("Opp.") ignore the dispositive fact that Time Warner, Inc. was identified in the *M2 Communications* Complaint under its then-current name, AOL Time Warner. As set forth in the Petition, Judge Pregerson i) knew that he owned Time Warner, Inc., ii) knew that the company was "formerly AOL Time Warner, Inc.," and iii) knew that the company was specifically identified in the Complaint as "AOL Time Warner." *Pet.* at 12. Recusal was automatic, mandatory, and nonwaivable under 28 U.S.C. §§ 455(b)(4) and (b)(5). The appearance of bias also required recusal under § 455(a).[1]

I. Judge Pregerson Was Indisputably Subject To the Mandatory Recusal Statute

Respondent's argument that 28 U.S.C. § 455(b)(4) does not apply is premised on its unsupported claim that "Judge Pregerson did not know that he owned stock in Time Warner." *Opp.* at 7. Judge Pregerson never asserted that he did not know that he owned stock in Time Warner, Inc. in this proceeding, and the evidence plainly demonstrates he did have such knowledge.

To support its claim of no knowledge, Respondent cites reporter hearsay from a *Washington Post* article concerning another case involving Time Warner, Inc., in which a reporter wrote that Judge Pregerson "said he did not realize he had a conflict, perhaps because he originally bought stock in AOL." *Washington Post*, April 18, 2006 [*Opp.*, at 10]. First, the rationale for not knowing of ownership of Time Warner based upon the Judge's original purchase of AOL cannot apply here, because Time

[1] Counsel for Defendant Gaylord informed counsel on January 23, 2007 that he was not filing an opposition brief but had not filed a formal waiver form because he was not a member of the Bar of this Court.

Warner, Inc. was specifically identified in the Complaint under its former name, "AOL Time Warner." *M2Comm* ER04-17/20. *See Pet.* at 9. Second, the position attributed to Judge Pregerson by the *Post* cannot be accurate, as the plain evidence shows that Judge Pregerson knew that he owned Time Warner, Inc. when he filled out his financial disclosure statements.[2]

The Ninth Circuit appeals for both cases commenced in 2003. Judge Pregerson knew he owned Time Warner, Inc. from the financial disclosure statement he filed on May 14, 2004, which covered the period January 1, 2003 through December 31, 2003. *MLPDecl.* Ex. 2 at 7-8. His knowledge was refreshed on June 4, 2004, when he acquired additional stock in Time Warner, Inc. *MLPDecl.* Ex. 2 at 12. Then, shortly after oral argument, on May 13, 2005 Judge Pregerson filed another financial disclosure statement for the period January 1, 2004 through December 31, 2004 that listed Time Warner, Inc. *MLPDecl.* Ex. 2 at 10-11. In fact, Judge Pregerson knew that he owned an equity interest in Time Warner, Inc. throughout the entire appeal. *See* Section III(A), below. The Judge's knowledge is indisputable and dispositive, because Time Warner, Inc. was identified by name in the Complaint (as "AOL Time Warner") as a real party in interest. ER04-17/20. Recusal under 28 U.S.C. § 455(b)(4) was automatic, mandatory, and nonwaivable.

Moreover, when Time Warner, Inc. acquired the accused division, Judge Pregerson as shareholder became a real party in interest to his own case, a situation that also required automatic, mandatory, and nonwaivable recusal. § 455(b)(5). *Pet.* at 21. At minimum,

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[2] Respondent [*Opp.* at 10] cites the Dec. of Mark L. Pettinari in Supp. of Mot. to Recall ("*MLPDecl.*"), Ex. 1 at 3 (chart of *Pet.* at 12, Table II). The *Post* chart was criticizing, not supporting, the "unknown AOL name" rationale upon which Respondent now relies. The accompanying contradictory graphic showed that Judge Pregerson had previously noted that Time Warner, Inc. was "formerly AOL Time Warner, Inc." in an earlier disclosure statement. *Pet.* at 12, Table II.

recusal was required under § 455(a) as a situation where the public, knowing all of the facts, would find an appearance of bias. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860-61 (1988). *Pet.* at 20.

II. *Liljeberg* Defines the Only Practicable Remedy

Respondent argues that, even if Judge Pregerson violated the mandatory recusal statute, the interest of finality and repose should trump the need to correct the structural due process violation. *Opp.* at 6. This Court has already confronted a substantially similar question in *Liljeberg*, which also called upon this Court to determine how to address a § 455 violation discovered after judgment. *Id.* at 861. While Respondent argues that similarity to *Liljeberg* is a reason *not* to issue a writ (the present case "will be of no precedential value" [*Opp.* at 5]), there is more reason to apply *Liljeberg* here.

Respondent essentially asks this Court to overturn *Liljeberg* and instead follow Judge Beezer's specially concurring opinions. *Opp.* at 6; Appendix to Petition ("*App.*") 2a, 5a. This Court should reject this invitation, as the new opinions – published opinions of the Ninth Circuit – have opened up a gaping loophole in 28 U.S.C. § 455. Absent a writ of mandamus here, the decisions create the opportunity for a conflicted federal judge to avoid the mandatory recusal statute in its entirety.

The problem lies in the timing of disclosure. In the Ninth Circuit, a party does not even learn the identity of the judges until one week before oral argument.[3] Thus, unless the judge discloses the conflict in proceedings, there is potentially no opportunity for a party to move to disqualify a conflicted judge under 28 U.S.C. § 455. While the rules require that a judge submit a financial disclosure statement, the procedure necessary for a party to obtain such a statement takes far longer than

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[3] *See* Ninth Circuit's Notice of Cases Set For Hearing, available at: http://www.ca9.uscourts.gov/ca9/Documents.nsf/54dbe3fb372dcb6c88256ce50065fcb8/e437fa645e4c14c788256778005d36a5/$FILE/ntc_hear.pdf

one week, and even if the statement is obtained it does not show current conflicts. *See The Chase Manhattan Bank v. Affiliated FM Insurance Co.*, 343 F.3d 120, 130-31 (2d Cir. 2003) ("[L]awyers for the most part expect judges to disqualify themselves under Section 455(b)(4). * * * [Even if lawyers were to review financial disclosure forms,] "those forms are generally a minimum of four months out-of-date"). By the rule sought by Respondent (*i.e.*, Judge Beezer's concurring opinion), a conflicted judge could simply take the case, elect not to disclose his financial interest, and rule so soon after oral argument as to prevent any opportunity of his financial interest being discovered before a judgment has been rendered. After the conflicted judge has rendered his opinion, he need not worry about 28 U.S.C. § 455 any longer, because under the Ninth Circuit's published opinions (and Respondent's argument [*Opp.* at 6]) the interests of finality and repose will control and the decision of the conflicted judge will be untouchable. This removes all appearance of justice.

As a practical matter, the Ninth Circuit's published opinions have broken the statute. This Court needs to step in to repair, so that the statute may carry the proper weight of its Congressional intent. Such repair requires only that this Court apply its prior decision of *Liljeberg* to issue a writ of mandamus against the substantially similar facts of the present case.

III. Correction of Respondent Misstatements

A. Judge Pregerson Had a Financial Conflict Throughout the Entire Time Period of Appeal

Respondent misleadingly suggests that the Judge's ownership of Time Warner, Inc. ceased on December 31, 2004. *Opp.* at 1. In fact, Judge Pregerson acknowledged ownership of Time Warner, Inc. for the entire period of the appeals, decided in late 2005. *App.* at 1a, 4a. Respondent relies upon the incorrect December 31, 2004 date to imply that Judge Pregerson was not assigned the cases until after that date – nearly 1 1/2 years after the appeals were filed. *Opp.* at 3. This impli-

cation is entirely unsupported. The Judge is silent on the issue, and the appearance is that he did participate in the early 2004 prejudicial orders that benefited the defendants. *Pet.* at 13 n. 10. The issue is moot because disqualification is required either way: Judge Pregerson acknowledged ownership of Time Warner, Inc. "at the time this case was assigned to this panel and at the time we decided it" and Time Warner, Inc.'s interests were at issue throughout. *App.* at 1a, 4a; *Pet.* at 9, 20, 23, 24.

B. § 455(a) Cases Concerning a Corporate Victim of Crime Apply a Different Standard

Respondent relies almost exclusively upon cases that reference conflicts far less direct than a judge's undisclosed financial interest under §§ 455(b)(4) and (5). Neither *In re Aguinda*, 241 F.3d 194 (2d Cir. 2001) nor *J. Hanshaw Ent., Inc. v. Emerald River*, 244 F.3d 1128 (9th Cir. 2001) [*Opp.* at 7] concerned a judge's financial interest. *U.S. v. Rogers*, 119 F.3d 1377 (9th Cir. 1997) and *U.S. v. Lauresen*, 348 F.3d 329 (2d Cir. 2003), *vacated by* 543 U.S. 1097 (2005) [*Opp.* at 8] concerned financial interest, but in the entirely different context of a corporate victim of crime in a criminal proceeding.

Though Respondent seeks to portray *Rogers* as a § 455(b)(4) case (characterizing it as concerning a judge who "held a limited financial interest in controversy," *Opp.* at 8), it is not. *Rogers* explicitly found that "stock ownership in the corporate victim of a crime *cannot* be deemed a financial interest in the subject matter in controversy." *Rogers*, 119 F.3d at 1384 (emphasis added).[4] *Lauersen* also concerned the corporate victim of crime, and explicitly noted that there was no claim being raised under § 455(b)(4) or (5). *Lauersen*, 348 F.3d at 334.

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[4] *Rogers* involved a full disclosure, waiver (28 U.S.C. § 455(e)), and a delay of 1 1/2 years. *Id.* at 1381-82. Here, there was *no* disclosure. Petitioner discovered the Judge's interest on June 22, 2006 through the online website of the *Post* (posting an earlier article published in the April 18, 2006 print edition), and filed its motion 15 days later. *MLPDecl.* at ¶2. This situation parallels *Liljeberg*, not *Rogers*.

Respondent avoids true § 455(b) cases because cases brought under § 455(b) by statute apply mandatory disqualification for a financial interest "however small." 28 U.S.C. § 455(d)(4). Congress intended to create "a bright-line test that is, as to actual partiality, more than a little overbroad." *The Chase Manhattan Bank*, 343 F.3d at 128. "[A] bright-line test as to equity interests in parties, particularly stock, avoids many difficult line-drawing decisions and is in that sense actually helpful to judges." *Id.* Respondent's cases do not apply this test.

C. M2 Has Yet to Receive Due Process Review By An Impartial Judge

Realizing that Judge Pregerson's disqualification was required against a bright-line test, Respondent resorts to arguing that due process was nonetheless satisfied because M2's case "was reviewed by the Ninth Circuit twice, and the Supreme Court twice, and was upheld each time." *Opp.* at 11. Respondent counts the election of the Ninth Circuit (upon Judge Pregerson's recommendation) not to vote for *en banc* review, and the election of this Court not to grant *certiorari*. Neither is an actual review. *See U.S. v. Carver*, 260 U.S. 482, 490 (1923) ("The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times"); *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950). This case has been reviewed only *once* – by a judge with a financial interest who contradicted a prior panel. *Cf. M2 Software, Inc. v. Viacom, Inc.*, 30 Fed.Appx. 710 (9th Cir. 2002). M2's Fifth Amendment constitutional right to due process requires that it be allowed a true appellate review by an impartial panel.[5]

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[5] Contrary to Respondent's claim [*Opp.* at ii], Judge Pregerson's conflict in two jurisdiction dismissals (Defendants Moseley and Gaylord) is also at issue. *See Pet.* at 15-16. Either Defendant could have safeguarded against disqualification had it identified Time Warner on its Rule 26.1 statement as new owner of the division accused in the lawsuit, after Time Warner, Inc.'s 2002 acquisition. *Pet.* at 9-10. *See The Chase Manhattan Bank*, 343 F.3d at 132-33 (appellees failed to revise court's disclosure statement to identify post-merger entity).

CONCLUSION

Respondent's Brief in Opposition is based on the false premise that Judge Pregerson did not know that he owned Time Warner, Inc. The evidence indisputably demonstrates otherwise. A Court of Appeals decision that preserved an acquisition by Time Warner, Inc. and found in favor of its interests was determined by a federal judge who knowingly owned equity in Time Warner, Inc. This was a plain violation of the statute. Recusal was automatic, mandatory, and nonwaivable by the bright-line tests of §§ 455(b)(4) and (b)(5). Further, the appearance of bias also required recusal under § 455(a). A writ of mandamus is necessary to direct the Ninth Circuit to enforce the nondiscretionary statute.

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